

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE BANK OF NEW YORK MELLON TRUST
COMPANY, N.A.,

Plaintiff-Counterclaim Defendant,

-against-

DEPFA BANK PLC and LLOYDS TSB BANK PLC,

Defendants-Counterclaimants.

DEPFA BANK PLC and LLOYDS TSB BANK PLC,

Third-Party Plaintiff,

-against-

ACCESS TO LOANS FOR LEARNING
STUDENT LOAN CORPORATION and
JPMORGAN CHASE BANK, N.A.

Third-Party Defendants.

LLOYDS TSB BANK PLC,

Third-Party Plaintiff,

-against-

ACCESS TO LOANS FOR LEARNING
STUDENT LOAN CORPORATION,

Third-Party Defendant.

Case No.: 10-CV-4424 (JPO) (AJP)

**DECLARATION OF JUDITH A.
ARCHER IN OPPOSITION TO
MOTION *IN LIMINE* TO
EXCLUDE CERTAIN EXPERT
TESTIMONY**

JUDITH A. ARCHER declares as follows pursuant to 28 U.S.C. § 1746(2):

1. I am a member of the bar of the State of New York and of this Court. I am a member of the firm of Fulbright & Jaworski, L.L.P., counsel herein for Plaintiff-Counterclaim Defendant The Bank of New York Mellon Trust Company, N.A. (“BNY Mellon”). I submit this declaration in opposition to the Motion *in Limine* of DEPFA Bank plc to Exclude Certain Expert Testimony for the limited purpose of putting documents before the Court.

2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the deposition of Robert I. Landau dated September 21, 2011.

3. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of the deposition of Jeffrey L. Baliban dated September 29, 2011.

4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the deposition of Scott Friedland dated September 19, 2011.

5. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of the deposition of Jack E. Blumenthal dated September 20, 2011.

6. All other documentary exhibits cited in the Memorandum of Law are contained in the Trial Exhibit binders that have been submitted to the Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 2011



Judith A. Archer

A handwritten signature in blue ink, appearing to read "Judith A. Archer". It is written in a cursive style with a horizontal line through it.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BANK OF NEW YORK MELLON TRUST
COMPANY NA,

Plaintiff,
CASE NO. 10-civ-4424 (DLC)
VS.

DEPFA BANK PLC, et al.,

Defendants.
-----X

VIDEOTAPED DEPOSITION

OF
ROBERT I. LANDAU
New York, New York

Wednesday, September 21, 2011

Reported by:
AYLETTE GONZALEZ, CLR
JOB NO. 42105

1 ROBERT I. LANDAU-9/21/11

2 A. I assume so.

3 Q. So, are you here to provide expert
4 testimony on how the Trust Indenture's term
5 should be interpreted?

6 MS. ARCHER: Object to the form.

7 A. I am here to testify as to what is
8 custom and practice in the industry in
9 understanding the terms of an Indenture. I'm
10 not here in a legal capacity to indicate how a
11 judge would decide that interpretation.

12 Q. So, if a term in any of the
13 Operative Agreements in this matter is
14 ambiguous, it's not your stated function here
15 to interpret how that ambiguity should be
16 resolved?

17 A. No, you're mischaracterizing what I
18 said, sir.

19 Q. Your answer is no?

20 A. The answer is that I will provide
21 my opinion as to how the term would be
22 interpreted by people within the securities
23 and banking industries.

24 Q. You're not substituting your
25 opinion for the judge's opinion on how a

1 ROBERT I. LANDAU-9/21/11

2 contractual term should be interpreted?

3 A. No, I don't know whether the judge
4 even has an opinion, so I'm certainly not
5 substituting it.

6 Q. Did you rely on any summaries of
7 depositions?

8 A. No, I think what I was given were
9 depositions, page after page, numbered
10 depositions.

11 Q. Did you read all the depositions?

12 A. I read the ones that I indicated in
13 my report.

14 Q. Did anybody provide you with a
15 written summary of what's contained in any of
16 those depositions?

17 A. No.

18 Q. Have you reviewed the reports of
19 any other experts in this case?

20 A. Yes.

21 Q. Whose report have you reviewed?

22 A. Mr. Powers, Mr. Thiel, Mr. Pope.

23 Q. With regard to Professor Thiel's
24 report, do you agree with his conclusions?

25 A. Absolutely not.

1 ROBERT I. LANDAU-9/21/11

2 to administer the provisions of the contract.

3 That's what they do.

4 Q. So, when you say, "the essential
5 function," are you using the word "essential"
6 as an another word for "only"?

7 A. No, because within the four corners
8 of the Indenture, the Trustee could also be
9 pointed, for example, as a conversion agent in
10 a conversion venture issue. So, that's not a
11 Trustee function. It's a conversion agent
12 function. But it's tied to being the Trustee.
13 So, essentially, you -- a synonym would be
14 primary, I guess, as opposed to only.

15 Q. Given the importance as you say in
16 your report of "administering the provisions
17 of an Indenture," is it important for the
18 Trustee to read and understand the provisions
19 of an Indenture?

20 A. Yes.

21 Q. Is it important for the Trustee to
22 determine whether directions from the issuer
23 are consistent with the provisions of the
24 Indenture it must administer?

25 MS. ARCHER: Objection to the

1 ROBERT I. LANDAU-9/21/11

2 form.

3 A. I'm not sure what you mean by the
4 word "consistent." If you mean consistent as
5 provided for in the Indenture or which
6 comports with the requirements set forth in
7 the Indenture, then the answer is yes.

8 Q. So, to obviate the objection, let
9 me ask it again. Is it important for the
10 Trustee to determine whether directions from
11 the issuer are in accordance with the
12 provisions of the Indenture in which the
13 Trustee administers?

14 MS. ARCHER: Same objection.

15 A. Same answer.

16 Q. And that is?

17 A. The one I gave you.

18 Q. So, your answer is that -- let me
19 ask it again then. Is it important for the
20 Trustee to determine whether direction from
21 the Issuer comport with the provisions of the
22 Indenture it must administer, which I believe
23 is the word you used?

24 A. Correct.

25 Q. And you think "comport" is

1 ROBERT I. LANDAU-9/21/11

2 different than "in accordance with"?

3 A. Yes, because the Trustee -- if the
4 directions it -- strike that.

5 A boilerplate provision of almost
6 every Indenture will contain a reliance
7 provision that the Trustee can except/accept
8 directions given to it by an Issuer, provided
9 it's in accordance with the provisions of the
10 Indenture.

11 That means that what it receives is
12 supposed to be something that it's supposed to
13 get, and supposed to cover those things which
14 it's supposed to cover, and that it's
15 appropriately signed by an authorized officer.
16 That would be that it comports with what it's
17 supposed to get.

18 Q. If the Trustee receives a direction
19 from an Issuer to do something that violates a
20 requirement of the Indenture, is the Trustee
21 required to do that for which the Issuer
22 requests?

23 MS. ARCHER: Object to the form.

24 A. The Trustee should not accept the
25 direction which -- in which -- in which it

1 ROBERT I. LANDAU-9/21/11

2 would be required to violate the Indenture
3 with respect to what it's supposed to get.

4 Q. What do you mean "with respect to
5 what it's supposed to get"?

6 A. There are three tests to what a
7 Trustee may accept in terms of direction from
8 an Issuer, and this is pretty much universally
9 understood in the industry. And so, what I'm
10 giving you is custom and practice in the
11 industry.

12 Number one, that the direction that
13 it receives is something which it is supposed
14 to receive pursuant to the terms of the
15 Indenture. Secondly, what it receives
16 comports with the requirement of the
17 Indenture. For example, if the obligor is
18 required to give a direction to the Trustee
19 with respect to a conversion rate, then that
20 certification has to include language with
21 respect to the conversion rate, not whether
22 it's correct or not. That's not the Trustee
23 role, but it's got to contain that.

24 If there's a direction to disburse
25 funds or to cause a redemption, it's got to

1 ROBERT I. LANDAU-9/21/11
2 have a language in there the Trustee
3 understands that's something that is
4 appropriate for the obligor to direct us to
5 do. It has that power. That's what I mean by
6 "comports with the requirements of the
7 Indenture."

8 The third test is, is it signed by
9 an appropriate person or an authorized person.

10 Q. Can the Trustee disburse monies
11 under the Trust at the direction of the Issuer
12 to a source not permitted under the Trust to
13 be disbursed to?

14 A. I guess the answer, in general, is
15 no.

16 Q. Does the Trustee have any
17 discretion in administering the provisions of
18 an Indenture Trust?

19 A. Pre-default or post-default?

20 Q. Pre-default.

21 A. The only discretion it has is in
22 how it complies with the requirement.

23 Q. What do you mean by that?

24 A. Well, there's nothing in the
25 Indenture that says you've got to keep your

1 ROBERT I. LANDAU-9/21/11
2 Certificate, and then it may immediately
3 read -- that is, the individual account
4 officer, may then read the relevant section of
5 the Indenture to which that Certificate
6 pertains to determine whether or not it is
7 what it's supposed to be.

8 Or, the account officer may be a
9 very experienced one, very knowledgeable, very
10 conversant with the requirements and not read
11 the Indenture.

12 Q. And when you say the account
13 officer would read the Indenture, you're
14 referring to the Indenture as well as any of
15 its supplements; isn't that right?

16 A. Yeah. Let me make a point, sir.

17 When we use the term, "Indenture," it's always
18 as supplemented, if supplemented.

19 It's like the president is required
20 to swear that he will uphold and defend the
21 Constitution of the United States. It doesn't
22 say the Constitution of the United States as
23 amended by amendments 1 through 27. It's the
24 entire Constitution, including the amendments.

25 So that when the term, "Indenture"

1 ROBERT I. LANDAU-9/21/11

2 in 2005; is that correct?

3 A. That's correct.

4 Q. And the DEPFA Standby Purchase
5 Agreement was executed in 2005; isn't that
6 correct?

7 A. I believe that's correct, yes.

8 Q. Landau Exhibit 2 and Landau Exhibit
9 3 references an examination of the Indenture
10 dated as of August 1, 2005, and Second
11 Supplemental Indenture; is that correct?

12 A. Yes. And certainly in the second
13 paragraph, Landau 2, now, in the first
14 sentence of the second paragraph, it refers to
15 the Trust Indenture as well as the second
16 supplement.

17 Q. Right. And it does the same thing
18 in the second paragraph of Landau Exhibit 3,
19 correct?

20 A. Well, let's see, second paragraph,
21 yes, it does.

22 Q. There's no reference in either of
23 those paragraphs to the First Supplemental
24 Indenture there?

25 A. No, doesn't have to.

1 ROBERT I. LANDAU-9/21/11

2 Q. Did you ask anyone at Sonnenschein
3 whether or not their definition of the word,
4 "Indenture" in Landau 2 and 3 included the
5 First Supplemental Indenture?

6 A. I did not ask them that, but
7 that's -- when we talk about a Trust
8 Indenture, we use the word, "Indenture," it
9 always means whatever supplements are attached
10 to it, just like the reference to the
11 Constitution. Does not have to say "as
12 amended." Everybody understands that an
13 Indenture in a transaction means the Indenture
14 if -- when, as and if it's amended, it
15 includes all amendments or supplements, I
16 should say, just as the Constitution is
17 amended.

18 Q. So, sir, you're interpreting Landau
19 Exhibit 2 and 3 where it refers to Indenture
20 to include the First Supplemental Indenture;
21 isn't that correct?

22 MS. ARCHER: Object to the form.

23 A. I am. I understand what the
24 reference is because it's a common way in the
25 industry that Counsel refers to Indentures

1 ROBERT I. LANDAU-9/21/11

2 that have supplements.

3 Q. Are you an expert on the custom and
4 practice of Counsel's Opinion Letters in the
5 bonds industry?

6 MS. ARCHER: Object to the form.

7 A. That relate to Bond Indentures,
8 yes.

9 Q. So, it's your testimony that
10 interpreting Landau Exhibit 2 and 3, you look
11 at the term, "Indenture," which refers to a
12 specific document, dated as of August 1, 2005,
13 and is defined as such to believe that also
14 includes the First Supplemental Indenture?

15 MS. ARCHER: Objection.

16 A. Yes, because the Indenture dated as
17 of August 2, 2005 will be the same document
18 with the same date. Regardless of how many
19 times it's amended, it still would be
20 characterized with that date.

21 Q. So, are you saying that if there
22 was a Supplemental Indenture of, say,
23 August 10, 2005, that when there's a reference
24 to an Indenture of August 1, 2005, that would
25 still include the August 10, 2005 Supplemental

1 ROBERT I. LANDAU-9/21/11

2 Indenture?

3 A. If you're using the word,
4 "Indenture," subsequent to that date, yes.

5 Q. And, again, sir, there's no
6 reference in either of these letters to using
7 any of the definitions set forth in the
8 Indenture. This is just you interpreting
9 these letters?

10 MS. ARCHER: Object to the form.

11 Feel free to go through the letters,
12 if you need.

13 A. You're miss -- I don't agree with
14 your conclusion, Counselor. It is my
15 understanding, having read hundreds and
16 hundreds of these opinions of Counsel, as to
17 how they're constructed, what they say, not
18 precisely word-for-word, but as to what they
19 say, what they cover, and what is meant when
20 they refer to an Indenture.

21 And based upon that knowledge in
22 the industry, I consider myself to be an
23 expert on what the industry does with respect
24 to these. This is a very, very common way.

25 Q. Have you seen any evidence, sir, in

1 ROBERT I. LANDAU-9/21/11

2 this case of Sonnenschein having actually
3 reviewed the First Supplemental Indenture?

4 A. I don't recall reading any
5 testimony about any attorney from
6 Sonnenschein.

7 Q. Have you seen any evidence that the
8 Trustee ever asked anyone at Sonnenschein
9 whether they reviewed the First Supplemental
10 Indenture?

11 MS. ARCHER: Object to the form.

12 A. I don't recall.

13 Q. If Sonnenschein had not reviewed
14 the First Supplemental Indenture in connection
15 with issuing these opinions, would it be
16 inappropriate for the Trustee to refer to
17 Landau 2 and 3?

18 A. Only if it had actual knowledge
19 that the law firm did not review it.

20 Anything -- actual knowledge overrides any
21 other consideration.

22 Q. That's your legal interpretation?

23 A. No, that's my understanding of how
24 people in the industry believe the conduct of
25 the Trustee is governed, based upon years and

1 ROBERT I. LANDAU-9/21/11

2 years of being involved with the industry and
3 attorneys in the industry. So, it's an
4 understanding of industry custom and practice.
5 It's not a legal opinion.

6 Q. In your report, Exhibit 1,
7 paragraph 21, you say, "The Trustee properly
8 relied upon the directions it received to
9 redeem student loan program revenue bonds."

10 Do you see that?

11 A. Yes.

12 Q. Was the Trustee permitted to rely
13 on directions from the Issuer without first
14 determining such payments were consistent with
15 the Indenture?

16 MS. ARCHER: Object to the form.

17 A. I don't know what you mean by
18 "consistent with the Indenture."

19 If, again, this is a direction, it
20 has to meet the test that I described earlier
21 this morning in this deposition. If it meets
22 the requirements of that test, a three-part
23 test, then the Trustee can rely upon it.

24 Q. Can the Trustee rely upon an
25 opinion by ALL to make a payment into a Swiss

1 ROBERT I. LANDAU-9/21/11

2 before?

3 A. Yes, I've read it.

4 Q. In addition to today?

5 A. Yes. You asked me questions about
6 it and, yes, as long as the Trustee had actual
7 knowledge with respect to these items, then he
8 might have to take action. Without actual
9 knowledge, there's nothing in there that it
10 can do.

11 Q. The word, "amend," can an amendment
12 consist of solely adding new rights and
13 obligations rather than changing existing
14 rights and obligations?

15 A. Under custom and practice in the
16 industry, an amendment changes.

17 Q. And a change could be the addition
18 of new rights? That's a change?

19 MS. ARCHER: Object to the form.

20 MR. KHONDKER: Object to the form.

21 A. It would have to -- to amend an
22 Indenture, number one, there's a requirement.
23 One has to refer to very specific provisions
24 of the Indenture. The amendment is not just a
25 general catchall. It changes existing

1 ROBERT I. LANDAU-9/21/11

2 that constitutes a change or modification of
3 the agreement, correct?

4 MS. ARCHER: This object to form.

5 A. I don't have a problem with you
6 using the words, "amend, modify, supplement,
7 enhance." All those things can fit in terms
8 of how -- what the words mean.

9 It's what is intended to be
10 accomplished by the document, by the
11 provisions, and it's clear that this -- that
12 this financing, this financing document
13 envisions multiple series of bonds. And
14 that's actually what happened.

15 Q. Is that your legal interpretation
16 of the document?

17 MS. ARCHER: Object to the form.

18 A. I never gave you a legal
19 interpretation ever.

20 Q. But you're providing a legal
21 interpretation of the agreement. You're not
22 testifying about custom and practice, are you?

23 A. Yes, I am.

24 MS. ARCHER: Object to the form.

25 Go ahead.

1 ROBERT I. LANDAU-9/21/11

2 A. I'm testifying to the understanding
3 in the industry as to what these kinds of
4 provisions mean, and how they're applied and
5 understood. At the end of the day, the
6 transaction is there to facilitate someone
7 borrowing money and to provide some
8 protections to the people who lend the money.

9 Q. As well as to provide protection to
10 the bondholders; is that correct?

11 A. The bondholders are normally the
12 people that provide the money. I mean,
13 they're the creditors.

14 Q. If you look back, sir, at Section
15 5.03 of the DEPFA Standby Purchase Agreement,
16 do you see the phrase, "or permit or suffer to
17 occur any action or omission which results in
18 or is equivalent to an amendment, modification
19 or grant of a waiver under the policy of the
20 Indenture," et cetera?

21 Do you see that?

22 A. Yes, this isn't.

23 Q. Sir, I haven't asked you a question
24 yet.

25 A. Oh, I thought you did. Excuse me.

1 ROBERT I. LANDAU-9/21/11

2 Q. I mean Lloyd's payment terms;
3 repayment of their bank bonds versus DEPFA
4 repayment terms. And DEPFA didn't know that,
5 did they?

6 MS. ARCHER: Object to the form.

7 A. Certainly did not. Certainly did
8 not. If you say they didn't know. I don't
9 have any knowledge if they did or didn't know,
10 so I can't give you an opinion on that.

11 Q. And those payment terms, which I'm
12 referring to, if the effect of those payment
13 terms was for DEPFA to receive substantially
14 less money than it would have received if
15 there had been no Lloyd's, isn't that a change
16 to the substantive rights of DEPFA?

17 MS. ARCHER: Object to the form.

18 MR. KHONDKER: Object to the form.

19 A. In my opinion, no, because that was
20 possible under the provisions of the Indenture
21 that they agreed to.

22 Q. Even though there was a consent
23 right for DEPFA, if anything changed their
24 substantive rights?

25 MS. ARCHER: Object to the form.

1 ROBERT I. LANDAU-9/21/11

2 MR. KHONDKER: Object to the form.

3 A. And that consent right did not
4 apply to a subsequent series of senior bonds
5 under the terms of the Indenture.

6 Q. That's your legal interpretation?

7 A. I'm not giving a legal
8 interpretation, Mr. Berman. I'm giving you my
9 common understanding in the industry of what
10 these terms mean and are understood to cover.

11 Q. If we go back to paragraph 24, you
12 see --

13 MS. ARCHER: Of his report?

14 Q. Of your report. Thank you.

15 Page 10, third sentence says,
16 "Although some Issuers and Indenture drafters
17 use the term, "Supplemental Indenture"
18 generically, especially on the cover, section
19 headers and/or provisions will always refer to
20 amending the Indenture when such or
21 substantive rights to existing rights,
22 obligations, responsibilities or liabilities
23 of the parties to or beneficiaries of the
24 Indenture provisions?"

25 Do you see that?

1 ROBERT I. LANDAU-9/21/11

2 will reflect the wishes of the parties to the
3 transaction.

4 Q. In paragraph 29 of your report, you
5 give the opinion that you would expect to see,
6 spelled out explicitly in the Indenture, any
7 right to consent to the issuance of an
8 additional series of bonds. Is that opinion
9 based on your experience?

10 A. Yes.

11 Q. How so?

12 A. Well, I've never seen an Indenture
13 in which subsequent potential purchasers of
14 bonds have to pass -- have to be agreed to by
15 prior purchasers of bonds.

16 In other words, Series A is
17 issued -- and all this would be spelled out in
18 the Indenture. Series A is issued, and the
19 Indenture says that the holders of Series A
20 bonds shall have the absolute right at any
21 time, and from time to time, to approve,
22 disapprove the purchasers of any subsequent
23 series of bonds, or the issuance of any
24 subsequent series.

25 In other words, the absolute --

1 ROBERT I. LANDAU-9/21/11

2 what I would call the absolute veto right.

3 I've never seen that provision because the
4 underwriters tell me they couldn't sell the
5 bond issue.

6 Q. So, it would be unusual, in your
7 experience, for an Issuer to grant that right
8 to a liquidity provider?

9 A. It would be more than unusual. It
10 is just highly unlikely that that would
11 happen.

12 Q. Do you know whether liquidity
13 providers ask for that right?

14 A. I don't know.

15 Q. Do you know whether DEPFA asked for
16 that right?

17 MR. BERMAN: Object to the form.

18 A. I don't know.

19 Q. I'm sorry, let me withdraw the
20 question.

21 Do you know whether DEPFA asked for
22 the right to consent to the issuance of
23 additional bonds?

24 A. I'm trying to remember. I don't
25 think so. I know that DEPFA was a contender

1 ROBERT I. LANDAU-9/21/11
2 to be the liquidity provider for the so-called
3 second series. What they -- I don't recall
4 reading anything as to what provisions they
5 wanted or insisted upon as a condition of
6 participation.

7 Q. In how many deals have you seen an
8 Issuer grant the right to consent to the
9 issuance of additional bonds to a liquidity
10 provider?

11 A. None.

12 Q. Do you agree with the idea that
13 consent of the liquidity provider is required
14 on an amendment or modification of an
15 Indenture unless the particular amendment or
16 modification is carved out as an exception?

17 MR. BERMAN: Object to the form.

18 Q. Do you understand the question?

19 A. No, you lost me. I'm sorry, I
20 apologize. I can't -- could you rephrase it?

21 Q. Okay. Have you seen consent
22 provisions in Indentures that have a carveout
23 saying that Indentures or Standby Liquidity
24 Agreements that say that have a carveout that
25 says that consent is not required for the

1 ROBERT I. LANDAU-9/21/11

2 issuance of additional bonds?

3 A. No, it would never -- based upon my
4 knowledge of the industry in how this worked,
5 it would not be -- it would not -- it would
6 just be the reverse. If the consent has to be
7 given, it has to be spelled out. It's not the
8 reverse. Consent is required is what would go
9 into the Indenture.

10 Q. Please take a look at Chapman 7,
11 the DEPFA SBPA that we've been discussing
12 today.

13 Have you reviewed this document in
14 connection with the preparation of your
15 report?

16 A. Yes.

17 Q. Where in Chapman 7, if you recall,
18 does it say that DEPFA's consent is required
19 for the issuance of additional bonds?

20 MR. BERMAN: Objection.

21 A. Well, let's just say since this is
22 not supposed to be a memory test, I don't
23 recall reading that.

24 Q. Do you know whether the Trust
25 Indenture or the first Supplemental Trust

EXHIBIT 2

Page 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BANK OF NEW YORK MELLON TRUST
COMPANY NA,

Plaintiff,
CASE NO. 10-civ-4424 (DLC)
VS.

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION

OF

JEFFREY L. BALIBAN

New York, New York

Thursday, September 29, 2011

Reported by:
AYLETTE GONZALEZ, CLR
JOB NO. 42110

1 JEFFREY L. BALIBAN-9/29/11

2 MS. ARCHER: Object to the form.

3 A. Can you repeat it?

4 (Whereupon, the referred to
5 question was read back by the
6 Reporter.)

7 A. Yes, I think there's some
8 confusion.

9 Q. In your report, do you take any
10 position as to how that ambiguity should be
11 resolved?

12 A. I don't.

13 Q. Is that outside the scope of your
14 engagement?

15 A. It is.

16 Q. Is it outside the scope of your
17 engagement to opine upon whether the
18 redemption schedules in Section 3.02 of the
19 SBPAs apply to loan account funds?

20 A. The scope of my work was to review
21 the reports of Mr. Friedland and
22 Mr. Blumenthal and provide rebuttal where I
23 believe necessary on their methodologies and
24 findings.

25 So, to the extent that their

1 JEFFREY L. BALIBAN-9/29/11
2 methodologies and findings make certain
3 assumptions, I reviewed the same agreements I
4 think that they did, or that they said they
5 did, and where I believe there was ambiguity
6 and they didn't, I pointed out that issue.

7 Q. Okay.

8 But are you offering an opinion as
9 to how the Court should resolve any ambiguity
10 in the contracts as to how or when to use loan
11 account funds for bank bond redemptions?

12 A. At this time, no.

13 Q. And if there's an ambiguity in the
14 documents, does that mean that there's more
15 than one reasonable interpretation?

16 A. It could.

17 Q. And could one of those reasonable
18 interpretations be that both revenue and loan
19 account funds are subject to the redemption
20 schedules in the SBPAs?

21 MS. ARCHER: Object to the form.

22 A. Perhaps.

23 MR. BARRES: I'm handing the
24 witness a document previously marked
25 Chapman Exhibit 8.

1 JEFFREY L. BALIBAN-9/29/11
2 reasonable minds could differ on how much
3 should be accrued by the individual making the
4 decision contemporaneously with issues
5 arising. And that not every person would
6 accrue the exact same amount.

7 And so, if you're going to make a
8 calculation of how much is owed in a damages
9 sense by one party to another, it's got to
10 presuppose that the decisions that were made
11 were somehow incorrect or wrong.

12 Q. Well, is an expert required to copy
13 the contemporary activities of a trust
14 administrator when he believes they are wrong?

15 MS. ARCHER: Object to the form.

16 A. I think an expert is required to
17 give due consideration in a matter like this
18 to what was done by the parties at the time
19 contemporaneously with the issues arising,
20 even if he disagrees with the amounts that
21 they used.

22 Unless, in his or her opinion, he
23 believes that the decisions that were made
24 were made without due professional care or
25 made incorrectly, improperly, irresponsibly or

1 JEFFREY L. BALIBAN-9/29/11

2 in an imprudent matter.

3 Q. Would you agree an expert is not
4 required to copy the contemporary activities
5 of a trust administrator when they are wrong?

6 MS. ARCHER: Object to the form.

7 A. When they are wrong is a difficult
8 aspect of your question. When you say "when
9 they are wrong," do you mean if I were to
10 think that a lower or a higher amount of an
11 accrual would have been more correct, that
12 doesn't necessarily mean that what was
13 actually accrued was wrong. I may just think
14 it's less correct.

15 But if I think that it was
16 irresponsible or imprudent or certainly did
17 not reflect professional due care in their
18 work, and I reached that opinion, then I would
19 think there would be, certainly, a correct way
20 to. You know, I would come up with my own
21 opinion of what I think should have been
22 accrued.

23 Q. So, when the damages expert
24 reasonably believes that the trust
25 administrator did something wrong at the time,

1 JEFFREY L. BALIBAN-9/29/11

2 then it is all right for the damages expert to
3 make a different assumption from the trust
4 administrator?

5 MS. ARCHER: Object to the form.

6 A. A damages expert can make whatever
7 assumption he or she wants. And if I'm
8 retained and am asked -- regardless of what
9 was done at the time, I want you to
10 reconstruct this and tell me what you think
11 should have been done. I can do that and I
12 might come up with a different response than
13 what was originally done.

14 But if I'm going to go into -- then
15 go into calculations to say, and as a result
16 of my work, party A owes money to party B or
17 party B is owed money by party -- by some
18 other party, that's a whole different thing.

19 Then I have to look at whether or
20 not there is -- there was some, you know, duty
21 to apply due professional care or whether
22 there was decisions made by the by the
23 individual who originally made them were
24 somehow inappropriate beyond just the fact
25 that the dollar amount may disagree with mine.

1 JEFFREY L. BALIBAN-9/29/11

2 A. It would depend on the assumption
3 that you're changing. I think he agreed that
4 if you changed certain assumptions
5 underpinning his analysis, that the numbers
6 may change significantly, insignificantly,
7 would depend on the assumption. I'm just
8 saying the same thing.

9 Q. In paragraph 14 of your report --

10 A. Okay.

11 Q. You write that BNY Mellon has
12 retained Navigant in this matter to "Review
13 Mr. Friedland and Mr. Blumenthal's report and
14 provide, where we believe necessary,
15 appropriate rebuttal to the opinions in the
16 two experts' reports.

17 In so doing, we analyze the key
18 assumptions and methodologies in light of the
19 terms and conditions in the Trust Indenture,
20 First and Second Supplemental Indenture, SBPAs
21 and/or other pertinent agreements."

22 Is that correct?

23 A. That's correct.

24 Q. Do you have an opinion as to
25 whether any of Mr. Friedland's key assumptions

1 JEFFREY L. BALIBAN-9/29/11
2 and methodologies were consistent or
3 inconsistent with the terms and conditions of
4 the various contracts that you read?

5 MS. ARCHER: Object to the form.

6 A. Well, I think that -- I think that
7 Mr. Friedland does assume the one pot of money
8 kind of theory. And unlike Mr. Blumenthal,
9 who also assumes the one pot of money, but
10 gives a second scenario assuming that the
11 Court ultimately finds that's not the case,
12 based on his recognition of the fact that
13 there is ambiguity. I note that Mr. Friedland
14 hasn't made -- hasn't made that. So, in
15 preparing his analysis, he assumed the one pot
16 of money.

17 In reading the agreements, just as
18 a financial person, I find that there is
19 inconsistent see or uncertainty or confusion
20 and would and there is nothing that
21 Mr. Friedland said in his report or his
22 deposition that convinced me that there was no
23 confusion or inconsistently.

24 And so by doing his calculations in
25 accordance with one specific interpretation,

1 JEFFREY L. BALIBAN-9/29/11

2 that may or may not be consistent with the
3 documents.

4 Q. It may or may not be consistent
5 with the documents?

6 A. Yes, if the Court were to come down
7 and say this is one pot of money and should be
8 treated as such.

9 Q. Isn't that true of anything?

10 A. Then I think that's consistent.

11 Q. Do you agree that it is or isn't
12 consistent with the documents?

13 MS. ARCHER: Object to the form.

14 That was a phrase you built into your
15 question.

16 A. No, I'm saying -- you're asking me
17 whether what he's done is consistent or
18 inconsistent with the documents what he's done
19 is consistent with one interpretation of the
20 documents, and absent the Court coming and
21 instructing us how they're to be interpreted,
22 my reading of it, my lay reading of it, shows
23 there's other interpretations. And to the
24 extent that those other interpretations are
25 correct, then what he's done is not consistent

1 JEFFREY L. BALIBAN-9/29/11
2 to amounts to be set aside pursuant to the
3 waterfall for bond interest payments to the
4 Department of Education perhaps other things;
5 is that correct?

6 A. The report says what it says.

7 Q. Do you believe that Mr. Friedland
8 supplanted management's judgment -- do you
9 believe that Mr. Friedland supplanted ALL's
10 realtime judgment with his own espoused view
11 with the timing and amounts of approvals that
12 should have been made?

13 A. So, your question is, do I -- am
14 I -- do I believe Mr. Friedland's calculation
15 supplants ALL's realtime judgment using his X
16 paused view yes that's my judgment.

17 Q. And are you opining that
18 management's judgment realtime judgment as to
19 the amounts to set aside and the timing of
20 accruals should be given some deference?

21 A. Define deference for me, if you
22 would. What do you mean by that?

23 Q. Well, let me see if I can remember
24 your words. Do you believe that management's
25 realtime judgment as to the timing and amount

1 JEFFREY L. BALIBAN-9/29/11
2 of set asides or items under the waterfall
3 should not be -- well, should not be disturbed
4 unless there has been a failure of due care,
5 professional responsibility or imprudence?

6 MS. ARCHER: Object to the form.

7 A. I certainly feel that management's
8 or ALL's realtime judgment needs to be
9 considered strongly before statements such as
10 there was sufficient money to redeem bonds or
11 money that should have been used for bond
12 redemption or any other characterization of
13 where that money should have gone when that
14 opinion conflicts with what ALL had done in
15 the circumstances.

16 So, if ALL were to say or, I'm
17 sorry, if Mr. Friedland were to say on this
18 particular day, there's \$24,387,469.15 that's
19 available for redemption and ALL, in their
20 realtime judgment, didn't use that money for
21 redemption. Unless you can show that they
22 were unreasonable in making -- in reaching
23 that conclusion or acted imprudently, then
24 before you say that money is available for
25 redemption, you have to understand the basis

1 JEFFREY L. BALIBAN-9/29/11
2 of why redemptions were not made and what
3 might have been going through Martha
4 Peterson's, or anyone else at ALL's, mind when
5 they reached the conclusion that
6 redemptions -- that money should not be used
7 for redemption before you can say it should
8 have been.

9 Q. Can you tell me what area of
10 scientific, technical or other specialized
11 knowledge you're drawing upon when you opine
12 that management realtime judgment needs to be
13 considered strongly before statements such as
14 there was sufficient money to redeem bonds or
15 money that should have been used for bond
16 redemption or any other characterization of
17 where that money should have gone when that
18 opinion conflicts with what ALL had done in
19 the circumstances?

20 MS. ARCHER: Object to the form.

21 A. I'm saying the hypothesis isn't
22 specifically specified. There's variables
23 that drive the decisions made that, obviously,
24 haven't been considered and may, in fact, be
25 important.

1 JEFFREY L. BALIBAN-9/29/11

2 Q. I asked you what area of
3 scientific, technical or other specialized
4 knowledge you're drawing upon when you gave --
5 I'm not going to repeat it again. The answer
6 that you gave two answers ago.

7 MS. ARCHER: Objection; asked and
8 answered.

9 Q. Were you announcing an accounting
10 principal? Were you announcing a forensic
11 accounting principal, a principal trust
12 administration?

13 Please tell me what area of
14 scientific or technical knowledge you are
15 drawing upon when you gave that answer?

16 MS. ARCHER: Same objection.

17 A. I'm drawing upon the application of
18 the scientific method as is generally
19 understood to economic, financial and
20 accounting decisions. Since in this case,
21 you're dealing with something that is, in
22 effect, an economic financial or accounting
23 decision whether or not certain amounts should
24 be used for this versus that.

25 And before you reach a conclusion

1 JEFFREY L. BALIBAN-9/29/11
2 that based on the evidence you see or that
3 you've considered at least there are amounts
4 of money that could have been used for purpose
5 A, although you see it has not been used for
6 purpose A, an economist will look at that and
7 say that either there was another reason, when
8 there was no other reason.

9 So, before you draw that
10 conclusion, you have to determine whether
11 there was another reason whether or not
12 another variable has to be considered in
13 making your forecast of amounts that would be
14 available under accounting rules or under
15 financial economic theory to be available to
16 be used to pay for bond redemption. And if he
17 hasn't considered -- there's certain variables
18 he hasn't considered, then I don't see how
19 his -- his calculation could only be correct
20 coincidentally.

21 Q. So, your statement that the
22 realtime judgment of management should be
23 strongly considered, that's principal of
24 economics?

25 MS. ARCHER: Objection; asked and

1 JEFFREY L. BALIBAN-9/29/11

2 Unless I fit -- unless I understand what that
3 is -- if I could know what that is it and then
4 dismiss it and say, well, it's not an
5 appropriate reason, then I might be able to
6 draw a conclusion.

7 But without making the inquiry,
8 without knowing what it is, drawing a
9 conclusion, an economic conclusion or
10 mathematical conclusion, is premature.

11 Q. Are you opining that ALL -- that
12 ALL's management practices with respect to
13 set-asides or redemptions in this case did
14 conform to the applicable standard of
15 professional care for a Trust administrator?

16 MS. ARCHER: Objection.

17 A. I'm -- I'll take the same position
18 I think that Mr. Friedland and Mr. Blumenthal
19 take, and that is, I'm not reaching a
20 conclusion on that and I have not seen
21 anything that leads me to believe -- leads me
22 to reach a conclusion one way or the other.

23 I mean, it's certainly outside of
24 the scope of what I was asked to do. I was
25 not asked to opine on ALL's behavior.

1 JEFFREY L. BALIBAN-9/29/11
2 administrator was -- what was in their
3 consideration at the time. And that's not to
4 say that their consideration is right wrong or
5 indifferent. It just depends on what they
6 were thinking at the time. And for me or
7 anyone else to come back on an espouse basis
8 and say, well, gee, I subtract out these
9 required transfers and there's money left,
10 therefore, that should have been used to
11 redeem bonds, there could be a very good
12 reason why that money was not used to redeem
13 bonds, and that it was in the best interest --
14 turns out to be in the best interest of the
15 Trust and in DEPFA and/or Lloyds that it
16 wasn't used to make those redemptions. I
17 don't know what they were and I wasn't asked
18 to figure that out. I'm just saying until you
19 -- until you analyze that and make a
20 determination as to what that could be, you
21 really can't say how much is available for
22 redemptions?

23 Q. What's -- what, sir, are you doing
24 other than -- what are you doing to assist the
25 trier of fact in this case?

1 JEFFREY L. BALIBAN-9/29/11

2 MS. ARCHER: Objection.

3 Q. Determine any dispute at issue and
4 specifically the dispute at issue whether
5 redemptions should or should not have been
6 made in any amount on at least some of the
7 dates on Friedland Exhibit C?

8 MS. ARCHER: Objection.

9 A. I'm assisting the trier of fact
10 understand what the potential limitations are
11 or rebuttals are that Mr. Friedland and/or
12 Mr. Blumenthal had said.

13 In particular with Mr. Friedland he
14 said there's money available for redemptions
15 on all of these dates. That may or may not be
16 a true statement. That's my rebuttal.

17 Nor does he say -- it could be that
18 he's saying there's money available for
19 redemptions and you should redeem four bonds
20 on each of those dates which for the first
21 four, five months is a de minimus amount and
22 is immaterial. And I don't know that I'd take
23 much issue with it.

24 Q. How are you assisting the trier of
25 fact by saying that Mr. Friedland's opinion

1 JEFFREY L. BALIBAN-9/29/11

2 may or may not be correct?

3 MS. ARCHER: Objection.

4 A. I'm saying that there are aspects
5 that I believe Mr. Peterson should have
6 considered -- I'm sorry, Mr. Friedland -- all
7 these names. That I believe Mr. Friedland
8 should have considered before making the
9 statement that funds are available for
10 redemption.

11 And I'm further observing that
12 there's limited value to the statement that
13 funds are available for redemption unless
14 you're going to offer some opinion as to how
15 much of those funds are available for
16 redemption.

17 If you have 4 million in the
18 account and you're offering the opinion that a
19 hundred thousand of it is available for
20 redemption, that's fine. That's different
21 from saying 22 million of 249 million is
22 available for redemption or all of the whole
23 24 million or half of it.

24 To say that funds are available for
25 redemption in and of itself without an amount

1 JEFFREY L. BALIBAN-9/29/11
2 is of limited value. And even without that,
3 unless an expert does the requisite analysis
4 to make certain that there's not any other
5 reason why funds were not used to make
6 redemptions, they can't necessarily draw that
7 conclusion.

8 Q. But you don't know what any of
9 those other reasons are?

10 MS. ARCHER: Objection; asked and
11 answered.

12 A. Again, I wasn't asked to determine
13 what those reasons are. I can look at the --
14 I can make my own observations as to what was
15 going on at time and what -- what Martha
16 Peterson was facing in terms of redemptions --
17 you know, sitting there in May, redemptions
18 coming up later in the month, two, three
19 months from then, further on down the line in
20 amounts that were enormous compared to what
21 was being carried on even both the revenue and
22 the loan account and -- but -- but what I was
23 asked to do is offer an opinion on what
24 Mr. Friedland is saying.

25 And my opinion on what

1 JEFFREY L. BALIBAN-9/29/11
2 redemption, and as a result does not make a
3 fair redemption, has the Trust administrator
4 act in a professionally responsible manner
5 with due care and prudently?

6 MS. ARCHER: Objection.

7 A. I don't know. I haven't -- I
8 haven't really considered that. So, I really
9 wouldn't be able to say.

10 Q. And are you opining that setting
11 aside six months of bond interest at all times
12 was a reasonable practice if that, indeed, was
13 the practice?

14 A. I am not opining that it was or was
15 not reasonable.

16 Q. And you're not opining that setting
17 bond interests on a -- or setting aside for
18 bond interests on a period to date basis would
19 be reasonable one way or the other?

20 A. That's right, I'm not.

21 Q. And in paragraph 44 of your report,
22 in summarizing Mr. Friedland's analysis, you
23 refer it -- you use the phrase, "claimed
24 redemption dates" for May 11, 2008 through
25 November 29, 2009. And by using the

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BANK OF NEW YORK MELLON TRUST
COMPANY NA,

Plaintiff,
vs. Civil Action No.
10 Civ 4424 (DLC)

DEPFA BANK PLC, et al.,

Defendants.

-----x
VIDEOTAPED DEPOSITION OF SCOTT FRIEDLAND

New York, New York

September 19, 2011

Reported by:

KATHY S. KLEPFER, RMR, RPR, CRR, CLR

JOB NO. 42103

1 S. Friedland

2 certificate and second is my knowledge of
3 Section 148.

4 Q. Independent of this case?

5 A. Independent of this case.

6 Q. Okay. Please look at the bottom of
7 page 1 of your report. Near the bottom of the
8 page, it says you have been involved in
9 investigations of securitizations of student
10 loans and the loan originator. Do you see that?

11 It's in Romanette iii.

12 A. Yes.

13 Q. How many of those types of
14 investigations?

15 A. It was one investigation, but there
16 were seven securitizations, I believe seven.

17 Q. Did you work on this investigation at
18 FTI?

19 A. Yes, sir.

20 Q. What kind of investigation was this?

21 A. An internal investigation.

22 Q. What was your role?

23 A. I -- as I guess senior managing
24 director on the matter, on the investigation.

25 Q. Why was there a need for an internal

1 S. Friedland

2 investigation?

3 A. I think it originated from
4 discrepancies found during the audit.

5 Q. Were the student loans that you
6 investigated in this engagement, were those held
7 in a trust?

8 A. Yes.

9 Q. Were bonds issued to investors?

10 A. In some of the trusts, yes.

11 Q. How many of the trusts?

12 A. I believe six of the seven.

13 Q. And how many investors were --

14 A. You know what, it may have been -- I
15 don't know if you're making a distinction
16 between bonds and notes. They may have been
17 notes as opposed to bonds.

18 Q. For each of the trusts?

19 A. For six of the seven, yes.

20 Q. They were notes instead of bonds?

21 A. That's right.

22 Q. Okay. How many investors were issued
23 notes in each trust?

24 A. I do not know.

25 Q. More than five?

1 S. Friedland

2 A. Most likely.

3 Q. For each trust?

4 A. I believe so.

5 Q. Okay. How many series of notes?

6 A. I don't recall.

7 Q. What government -- I'm sorry, what
8 document governed the repayment of the bonds
9 issued by these trusts -- or, the notes? I'm
10 sorry.

11 A. There were indentures for each of the
12 trusts.

13 Q. Was there a waterfall in place to pay
14 the costs associated with the trust?

15 A. Yes.

16 Q. And to repay bondholders?

17 A. Or noteholders, yes.

18 Q. Okay. Did you analyze whether
19 redemptions could be made?

20 A. I believe that was part of our
21 analysis, yes.

22 Q. What was your -- what was your
23 analysis designed to accomplish?

24 A. The correct reporting for the
25 transactions of these -- of the -- primarily of

1 S. Friedland

2 the company, the --

3 Q. There was a concern that the reporting
4 had been inaccurate?

5 A. Yes.

6 Q. In what regard?

7 A. The -- there was a variety of issues.
8 There was a concern of fraud; there was concern
9 of theft of funds; there was a concern of
10 inappropriate use of the collateral in the
11 different trusts.

12 Q. And did these concerns affect how
13 redemptions were made?

14 A. Yes.

15 Q. In what way?

16 A. They would impact the availability of
17 funds for redemptions.

18 Q. Meaning that there would be more funds
19 available or less funds available?

20 A. Less.

21 Q. And how were -- how did the trustee
22 for the trust know how to make redemptions?

23 MR. FOURMAUX: Objection.

24 Q. Was there a document that governed or
25 guided the trustee in terms of how redemptions

1 S. Friedland

2 were made?

3 A. Yes.

4 Q. And what was that?

5 A. The indenture.

6 Q. For each of the trusts?

7 A. That's right.

8 Q. Okay. Did you analyze how to pay
9 expenses from the trust under each of the
10 indentures?

11 A. It was part of the analysis, yes.

12 Q. And how to pay interest to bondholders
13 or noteholders?

14 A. Same answer, yes.

15 Q. Did you analyze how to make accruals
16 according to the indenture documents?

17 A. Accruals were required, the analysis
18 included accruals, but I don't think an analysis
19 was necessary to figure out how to do the
20 accruals.

21 Q. Were the accruals different for each
22 of the trusts?

23 A. I don't think so.

24 Q. Please look at the top of page 2 of
25 Friedland 1. When you say, "I have performed

1 S. Friedland

2 Q. Okay. Do you know whether bonds or
3 notes were issued?

4 A. I don't recall. I presume if there
5 were bonds issued, there would have been a trust
6 involved.

7 Q. Were you asked to do any analysis
8 concerning bonds or notes for this engagement?

9 A. No.

10 Q. Were you asked to do an analysis of an
11 indenture or the waterfall within an indenture
12 for this engagement?

13 A. No.

14 Q. Were you asked to analyze how
15 redemptions could be made --

16 A. No.

17 Q. -- for this engagement?

18 What about accruals or interest
19 payments to bondholders?

20 A. Same answer. No.

21 Q. Okay. If I refer to standby bond
22 purchases agreements as SBPAs, will you know
23 what I'm referring to?

24 A. Yes.

25 Q. Have you worked on any deals involving

1 S. Friedland

2 Q. Who asked you to do that?

3 A. Counsel.

4 Q. Okay. Why?

5 A. My understanding is, subsequent to
6 November 29, 2009, that there were -- there were
7 agreements amongst the parties not to have any
8 more redemptions.

9 Q. Does your report indicate what
10 damages, if any, the banks suffered?

11 A. No, sir.

12 Q. Does your report show what payments
13 should have been made to Lloyds or DEPFA?

14 A. No, sir.

15 Q. Please turn to page 1 of Exhibit C.
16 May 11, 2008 is the first date you analyze?

17 A. Yes, sir.

18 Q. And why did you select that date?

19 A. Because that is, according to the
20 schedule of liquidity payments -- I'm not sure
21 if I'm using the right term, but I think you
22 know what I mean -- according to the schedule of
23 payments made by the liquidity providers and by
24 the terms of the standby bond purchase agreement
25 for Lloyds, this is the first date possible for

1 S. Friedland

2 counsel to examine records of the trust's

3 accounts and expenses, to apply the indenture

4 waterfall on each of the mandatory redemption

5 dates in the period May 11, 2008 through

6 November 29, 2009, and determine whether there

7 were sufficient funds to meet the higher

8 priority expenses and still redeem bonds on

9 those dates." Is that a correct explanation of

10 what you were asked to do?

11 A. Yes.

12 Q. Were you at any time asked to opine on
13 any other topic? 4.

14 A. No.

15 Q. Do you intend to offer any opinion on
16 economic damages?

17 A. I have not been asked to do that.

18 Q. And you don't intend to correct?

19 A Not unless I'm asked to

20 Q. Do you intend to express an opinion as
21 to whether DEFRA has suffered any damages?

22 A The same answer

23 Q You haven't been asked to?

24 A And -- right

Q. Same question with respect to clouds.

1 S. Friedland

2 A. So I don't have an opinion one way or
3 the other.

4 Q. Would that have been an appropriate
5 exercise of judgment for ALL to make a
6 determination as to what its accrual should be
7 being in that position?

8 A. Again, I have not considered this
9 question and I do not have an opinion on it.

10 Q. Now, given that a portion of the
11 period was during some tough economic times,
12 would it have been justified, would ALL have
13 been justified in being more conservative in its
14 accruals?

15 MR. KHONDKER: Objection to form.

16 MR. FOURMAUX: Objection.

17 Q. For example, in 2008 and 2009.

18 A. I think it was required to follow the
19 indenture consistently.

20 Q. Does the indenture specify exactly how
21 interest is to be accrued?

22 A. In my mind, it does.

23 Q. It's -- it's absolutely clear in your
24 mind, no ambiguity?

25 A. I think the application of the

1 S. Friedland

2 Q. Okay. If that were the case, would it
3 be reasonable for an issuer to determine a --
4 or, to decide on a conservative method of
5 setting aside funds for the interest payments?

6 MR. KHONDKER: Objection to form.

7 A. Well, I believe they're tied to what
8 the indenture states. If "conservative" means
9 making a judgment that is still within what's
10 allowable under the indenture -- well, first of
11 all, you know, I wasn't asked to make -- have an
12 opinion as to what reasonable judgments are
13 for -- for -- for ALL to have made. So I don't
14 have an opinion one way or the other. I was
15 just stating that, generally speaking, one has
16 to follow the indenture.

17 Q. So you don't have an opinion one way
18 or the other if -- if inability to pay interest
19 payments was an event of default, if that would
20 justify a more conservative method under the
21 indenture?

22 A. That's right. I think the indenture
23 was written to balance between making funds
24 available and avoiding default, and I don't
25 think one has to add more to what the indenture

1 S. Friedland

2 Q. Did you form any opinions about the --
3 the net numbers, principal owed, interest owed
4 and total owed in any of the tables on page 16
5 through 18 of Mr. Blumenthal's report?

6 A. No, I was not asked to, and I think we
7 discussed before I did not attempt to do any
8 damages analysis. So I have no opinion one way
9 or the other.

10 MS. ARCHER: Can we mark as Friedland
11 Exhibit 4 the rebuttal report of Jeffrey L.
12 Baliban dated August 31, 2011.

13 (Friedland Exhibit 4, Rebuttal Report
14 of Jeffrey L. Baliban, August 31, 2011,
15 marked for identification, as of this date.)

16 BY MS. ARCHER:

17 Q. Did you review Mr. Baliban's report,
18 Mr. Friedland?

19 A. I have.

20 Q. Have you been asked to prepare a
21 rebuttal or any supplement to your report to
22 redress -- to address his opinions?

23 A. I have not.

24 Q. Do you intend to?

25 A. Only if I'm asked to.

EXHIBIT 4

Page 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BANK OF NEW YORK MELLON TRUST
COMPANY NA,

Plaintiff,
CASE NO. 10-civ-4424 (DLC)
VS.

DEPFA BANK PLC, et al.,

Defendants.

-----X

VIDEOTAPED DEPOSITION

OF

JACK E. BLUMENTHAL

New York, New York

Tuesday, September 20, 2011

Reported by:
AYLETTE GONZALEZ, CLR
JOB NO. 42104

1 JACK E. BLUMENTHAL-9/20/11

2 A. Okay.

3 Q. Now, Mr. Fourmaux referred you to
4 page 3 of your report earlier today.

5 A. Which one?

6 Q. The initial report.

7 A. I mean which Mr. Fourmaux. No,
8 number 3, the first report?

9 Q. Yes. Specifically the paragraph
10 under "Overview Of Economic Loss Calculation"?

11 A. Yes.

12 Q. You read that paragraph into the
13 record?

14 A. Yes.

15 Q. Were you asked to opine on any
16 other topic than what's expressed in that
17 first paragraph?

18 A. No.

19 Q. And that --

20 A. Excuse me. When you say the first
21 paragraph, you really mean that section called
22 "Overview Of Economic Loss Calculation"?

23 Q. Yes.

24 A. The answer is no. This is all
25 we've been asked to opine on.

1 JACK E. BLUMENTHAL-9/20/11

2 Q. Okay. Now, do you intend to
3 express an opinion as to the liability or
4 fault of ALL in this case?

5 A. Not that I'm aware of at this time.

6 Q. You haven't been asked to express
7 such an opinion?

8 A. That's correct.

9 Q. Do you intend to express an opinion
10 as to liabilities or fault of the trustee in
11 this case?

12 A. Not at this time.

13 Q. And you haven't been asked to?

14 A. That's correct.

15 Q. Do you intend to express any
16 opinion as to whether ALL breached the
17 Indenture or any other transaction document?

18 A. I don't believe so.

19 Q. You haven't been asked to express
20 such an opinion?

21 A. That's correct, at this time.

22 Q. If you were asked to express an
23 opinion as to whether ALL breached the
24 Indenture, would you have to do other work to
25 develop such an opinion?

1 JACK E. BLUMENTHAL-9/20/11

2 A. Yes.

3 Q. What would that consist of, as you
4 sit here today?

5 A. Well, I don't even know. When you
6 say, if I were to asked to do that, I don't
7 know if I could even do it. It depends. When
8 you talk about breaching an agreement, you're
9 talking about a lot of legal issues, and I'm
10 not a lawyer. And I'm not licensed to
11 practice law, nor do I practice law.

12 So, it would depend on what I were
13 asked to do, and I haven't given any thought
14 to that.

15 Q. Okay.

16 A. Nor was I asked to consider it or
17 anything else. I just simply haven't thought
18 about it at all.

19 Q. Were you asked to express any
20 opinion as to whether the trustee breached the
21 Indenture or any other bond document?

22 A. Was I asked whether --

23 Q. To express an opinion as to whether
24 the trustee breached the Indenture of any of
25 the other bond documents?

1 JACK E. BLUMENTHAL-9/20/11

2 A. No, I wasn't asked to do that.

3 Q. And you don't intend to express any
4 such opinion as you sit there today?

5 A. I have no intention at this time,
6 correct.

7 Q. Have you been asked to express any
8 opinion as to whether ALL breached a duty to
9 Lloyds or DEPFA?

10 A. No.

11 Q. As you sit here today, you don't
12 intend to express such an opinion?

13 A. I don't.

14 Q. Same question with respect to the
15 trustee; have you been asked to express such
16 an opinion as to whether the trustee breached
17 any such duty to Lloyds or DEPFA?

18 A. No.

19 Q. Do you intend to express any such
20 opinion, as you sit here today?

21 A. I have no -- I'm not aware of any
22 plan to change it.

23 Q. Okay.

24 Do you -- have you been asked to
25 express any opinion as to the scope of the

1 JACK E. BLUMENTHAL-9/20/11

2 trustee's duties to DEPFA and Lloyds?

3 A. No.

4 Q. With respect to any of the matters
5 that we've just discussed, whether there's
6 liability or fault on the part of ALL or the
7 trustee, whether there were breaches of the
8 Indenture or duty by ALL or the trustee to
9 Lloyds or DEPFA, do you, as you sit here
10 today, have any opinions on those topics?

11 A. No.

12 Q. Do you have an opinion as to
13 whether ALL acted negligently in its
14 performance of its duties as a program
15 administrator?

16 A. Do I have an opinion?

17 Q. Yes.

18 A. To express? ^{to}

19 Q. Yes.

20 A. With respect to that?

21 Q. Yes.

22 A. No.

23 Q. Do you have an opinion as to
24 whether ALL acted reasonably or unreasonably
25 in connection with its performance of its

1 JACK E. BLUMENTHAL-9/20/11

2 duties as a program administrator?

3 A. That was outside the scope of what
4 I've been asked to do.

5 Q. Do you have a -- do you have an
6 opinion as to whether ALL acted consistent
7 with the standard of professional care in
8 connection with its responsibilities as
9 program administrator?

10 A. Excuse me; could you please reread
11 the first one or two sentences of that?

12 Q. I think it was one sentence, but it
13 was just really long.

14 (Whereupon, the referred to
15 question was read back by the
16 Reporter.)

17 A. No, I have no opinion on that.

18 Q. Do you have an opinion as to
19 whether ALL acted prudently or imprudently
20 with respect to its responsibilities as a
21 program administrator?

22 A. That's outside the scope of my
23 engagement.

24 Q. Okay.

25 Have you been involved in or worked

1 JACK E. BLUMENTHAL-9/20/11

2 on any bond transactions in which ALL was an
3 issuer or was otherwise involved?

4 A. Not to my knowledge.

5 Q. What is your opinion as to whether
6 there are monies owed by the trust estate to
7 Lloyds?

8 A. Again, please, I'm sorry; can you
9 please repeat the question?

10 (Whereupon, the referred to
11 question was read back by the
12 Reporter.)

13 A. I think it's stated in my report.

14 Q. And would the -- well, let's take
15 it this way: Is it your opinion that the
16 trust estate owes money to Lloyds?

17 A. Yes.

18 Q. And would the amount of that money
19 vary based on your Scenario 1 and Scenario 2
20 in your report?

21 A. Yes.

22 Q. Do you have any opinion, other than
23 the amounts set forth on the last couple of
24 pages of your report, as to the amount of
25 monies owed by the trust estate to Lloyds?

1 JACK E. BLUMENTHAL-9/20/11

2 A. No.

3 Q. Are you expressing an opinion in
4 your report as to whether ALL or the trustee
5 owe money to Lloyds?

6 A. Could you repeat that question?

7 Q. Does your report express an opinion
8 as to whether ALL or the trustee owe money to
9 Lloyds?

10 A. I'm not sure that I understand that
11 question. Are you referring to whether Bank
12 of New York Mellon owes money to Lloyds above
13 and beyond what I've computed? Whether they
14 owe the money or the trust estate owes the
15 money?

16 Q. Yes. Can you answer that question?
17 Are you expressing an opinion as to that?

18 A. It would be helpful if you could
19 break apart --

20 Q. ALL and the trustee?

21 A. ALL, the trustee and the trust
22 estate from each other because that's where
23 we -- it could get a little confusing in terms
24 of what the -- how I would answer those
25 questions.

1 JACK E. BLUMENTHAL-9/20/11

2 Q. In your report, page 16, your
3 conclusions, okay, you state, "It's my opinion
4 that the following amounts are owed to DEPFA
5 and Lloyds respectfully from the trust account
6 for the bonds, as of November 5, 2009 and as
7 of July 1, 2011."

8 Have I accurately read that?

9 A. Yes.

10 Q. Are you expressing an opinion in
11 your report that there are amounts owed to
12 DEPFA and Lloyds from ALL as opposed to the
13 trust account?

14 A. The figures expressed here are what
15 should have been paid by the trust account.
16 Now, basically, these are the figures that are
17 owed, in my opinion, under the different
18 scenarios or time frames or certain periods of
19 time with respect to what is owed to Lloyds
20 and what is owed to DEPFA --

21 Q. Yes.

22 A. -- under these documents by the
23 trust estate. Now, whether or not -- that's
24 all I'm computing.

25 Q. So, you're not expressing an

1 JACK E. BLUMENTHAL-9/20/11

2 opinion that there are amounts that ALL should
3 pay to Lloyds or DEPFA?

4 A. That is correct. That's outside
5 the scope of my engagement.

6 Q. And would the same answer be true
7 for the trustee; that you're not expressing an
8 opinion that there are amounts that the
9 trustee owes to Lloyds or DEPFA?

10 A. That is correct.

11 Q. Earlier in your report when you say
12 "Overview Of Economic Loss Calculations" on
13 page 3 --

14 A. Excuse me. Is this the --

15 Q. The original report, yes, yes.
16 What do you mean by, "economic loss"?

17 A. Well, in this case, what I mean by
18 economic loss is, given the two scenarios and
19 given the two different points in time, it
20 really -- it doesn't -- it doesn't incorporate
21 what the interest on the money is that should
22 have been paid out to either of the party.

23 When I say, "interest," I'm not
24 talking about interest on the bond. I'm
25 talking about interest on the fact -- interest

1 JACK E. BLUMENTHAL-9/20/11

2 associated with the payments that were not
3 made in a timely fashion.

4 Have I made myself clear there.

5 Q. That you are not including that
6 interest?

7 A. If any, that's correct.

8 Q. You're referring to the time value
9 of money?

10 A. Yes, ma'am.

11 Q. So, I understand it doesn't include
12 that. What does it include?

13 A. It includes, very simply, the
14 amount of money -- it's the net amount -- that
15 is to say -- if we look at it this way; what
16 should have been paid to Lloyds and what
17 should have been paid to DEPFA, minus what was
18 paid to Lloyds and what was paid to DEPFA,
19 without incorporating the concept of the time
20 value of those amounts over time that should
21 have been paid out or should not have been
22 paid out.

23 Q. In your view, is economic loss
24 equal to economic damages? Is it the same
25 concept?

1 JACK E. BLUMENTHAL-9/20/11

2 A. Economic damages, as I understand
3 them, incorporate the concept of legal
4 measures of damage which is a legal -- has a
5 legal framework that can be set apart from an
6 economic framework. And so when we talk
7 about -- when I talk about damages -- this is
8 my personal understanding.

9 To me, damages incorporate the
10 legal interpretation of the measure of damages
11 under those circumstances and directly to the
12 points here, I did not consider that.

13 Q. So, is it correct that you are not
14 offering an opinion on damages suffered by
15 either Lloyds or DEPFA?

16 MR. BARRES: Object to the form.

17 A. I don't know if I'm going to be
18 asked to or not.

19 Q. Is it correct that you haven't been
20 thus far asked to?

21 A. That's correct.

22 Q. As you sit here today, do you have
23 an opinion on whether Lloyds suffered damages
24 as distinct from how you've defined economic
25 loss?